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Aggregation Settlement and Dismay

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AGGREGATION, SETTLEMENT, AND DISMAY

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I
MARCUS AND COFFEE ON JUDICIAL HANDIWORK: CHANGING SUBSTANCE AND PROCEDURE VIA THE CLASS ACTION RULE

Richard Marcus and Jack Coffee argue that federal judges are relying on the class action rule (Federal Rule of Civil Procedure 23) to revamp both substance and procedure.[1] Both papers represent attempts to link the efforts of lawyers and judges across an array of cases and to provide a coherent picture of the emerging new rules and doctrine, both substantive and procedural. Coffee and Marcus strive to place a series of federal mass tort class action litigations in a broader

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Like many of those who write in this Symposium, I have participated in some fashion in a few of the activities that form the basis for discussion. Along with Professor Thomas D. Rowe, Jr., I provided an opinion letter to the 1991 Ad Hoc Committee on Asbestos of the Judicial Conference of the United States (sometimes called the "Rehnquist" Committee, in reference to the Chief Justice's request for its creation, or the "Reavley" committee, in reference to its chair, Judge Reavley). I have also served as a court-appointed expert in a class action ERISA litigation; served (with Dennis Curtis) as an attorney on behalf of individually retained plaintiffs' attorneys in a multidistrict litigation about a hotel fire; was briefly consulted by objectors in the asbestos future class litigation; and have represented prisoners in civil rights class actions. I am also a consultant to RAND's Institute for Civil Justice and a member of the American Law Institute.

My thanks to Denny Curtis, Deborah Hensler, George Priest, John Langbein, Stephen Yeazell, Harvey Nachman, Richard Bieder, and Stephen Wizner, from and with whom I have learned a good deal about large scale cases and the needs, interests, incentives, and concerns of litigants, lawyers, and judges involved. Thanks also to Patricia Howard and Robert A. Cahn, Clerk and Executive Attorney for the Multidistrict Litigation Panel, both of whom provided and explained data to me, as well as to Steven Vaughan and Gregory Porter for wonderful research assistance.

[1] John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*: Discussion Draft of October 1994 [hereinafter Coffee, Collusion Draft]. *See also* John C. Coffee, Jr., Summary, *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851 (1995) [hereinafter Coffee, Summary]; John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. (forthcoming October 1995); Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858 (1995).

context, in an effort to understand a *phenomenon* rather than a particular case.

As Marcus explains, while Congress has not (as of this writing) enacted any of the various legislative proposals for tort reform, federal judges have functionally undertaken "tort reform" through their work under Rule 23. That is, judges have approved (and, to varying extents, designed) class action settlements that eliminate punitive damages;[2] created priorities of rights by staggering the processing of claims and categorizing the values of claims; recognized to some extent a tort of fear of future injury;[3] altered standards of proof of causation and injury; and capped payments.[4] Professor Coffee would add a few other items to this list of federal judicial innovations—that judges have imposed new requirements on eligibility for compensation, excluded lesser injuries from compensation, and sanctioned the queuing of claimants so that only a certain number of claims are paid in a given year.[5]

Marcus analogizes federal judicial handiwork to Congress's black lung program.[6] To me, prioritizing categories of claimants and scheduling benefits is reminiscent of bankruptcy proceedings and certain forms of administrative adjudicatory remedies. As I described in a 1991 essay (*From "Cases" to "Litigation"*[7]), by creating "claims facilities" to administer payment schemes, the judiciary has crafted a series of entities akin to mini-agencies, empowered by court orders to implement compensation schemes. Whatever analogies are chosen for the judiciary's work, many of the parallels come from congressional statutes.

Jack Coffee in turn explores how, via Rule 23, federal judges are altering incentives and affecting the relative negotiating power of par-

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2 Marcus, *supra* note 1, at 870, 875. Marcus also points out that federal judges differ in the degree to which they overtly embrace such a role. *See e.g.*, Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 302-16; *cf.* Dunn v. Hovic, 1 F.3d 1371, 1387 (3d Cir.) (declining to abolish punitive damages de jure because of the undesirability of judicial resolution of such "policy" issues), *cert. denied*, 114 S. Ct. 650 (1993). *See generally* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION (1995).

3 Marcus describes the federal courts as having "abolish[ed] or curtail[ed] claims for fear of future harm." Marcus, *supra* note 1, at 870. Alternatively, one could describe some federal courts, along with a minority of states, as recognizing such claims. *See* Coffee, Collusion Draft, *supra* note 1, at 16-17. Memorandum from Roger C. Cramton to the Participants in the Cornell Law School Colloquium on Mass Tort Litigation (Sept. 19, 1994, with addendum/corrections of Sept. 27, 1994) (on file with author) [hereinafter Cramton Memorandum of Sept. 19, 1994].

4 *See* Marcus, *supra* note 1, at 870.

5 Coffee, Collusion Draft, *supra* note 1, at 34.

6 Marcus, *supra* note 1, at 870.

7 Judith Resnik, *From "Cases" to "Litigation,"* LAW & CONTEMP. PROBS., Summer 1991, at 5, 63.

ties. According to Coffee, class actions used to be understood as a potent *plaintiffs'* weapon, creating a means of leveraging power against defendants.[8] Coffee argues that now, in the context of mass tort settlement class actions (in which certification is linked to classwide settlement), Rule 23 has become a tool of defendants.[9] Coffee sketches the search for what the jargon now calls "global settlements,"[10] desired by a judiciary anxious about both the volume of individual tort actions and defendants' projections of the exhaustion of funds from which compensation can be paid.

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8 Coffee, Collusion Draft, *supra* note 1, at 2.

9 As Coffee puts it, Rule 23 class actions are becoming "not a sword for plaintiffs, but a shield for defendants." Coffee, Collusion Draft, *supra* note 1, at 3. Coffee does not explain why this role reversal is troubling, aside from its "historic reversal in the role of the class action." *Id.*

One might argue against procedural rules being either "pro" plaintiff or "pro" defendant and for rules to be "neutral" as between plaintiff and defendant. As I have detailed elsewhere, a good deal of civil procedural rulemaking (as contrasted with criminal procedural rulemaking) is animated by the assumption of *procedural neutrality*. That assumption is in turn linked to others—that neutrality comes either by virtue of rules that operate evenhandedly, regardless of whether one's position is that of plaintiff or defendant, or by virtue of the presumed *interchangeability* of civil plaintiffs and defendants. Were litigants interchangeable, i.e. today a plaintiff, tomorrow a defendant, any biases in rules might wash out over time. *See* Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2225-26 (1988). As I discussed in that essay, however, in some segments of the litigation world, certain groups of people or entities do not routinely swap sides.

Coffee also does not fully explain why, if "plaintiffs . . . typically fare better today in individual actions," that advantage should be the baseline from which to measure contemporary innovation—and to find aggregate processing wanting and in need of restructuring to give "special protections" to plaintiffs. Coffee, Collusion Draft, *supra* note 1, at 3. Coffee seems to argue that plaintiffs are better served by the incentives of an individualized system because those incentives produce more intensified struggle. *Id.* at 4. While he admits that an individualized system may also work "poorly," he argues that class treatment only "aggravates" the problems. *Id.* at 9.

For discussion of arguments for individualization, see Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals within the Aggregate: Representation and Fees*, forthcoming N.Y.U. L. REV. 1995 [hereinafter Resnik, Curtis & Hensler, *Individuals within the Aggregate*].

10 Coffee's discussion about whether one can accurately capture the interests involved in large scale mass torts with the nomenclature of "plaintiffs" and "defendants" is questionable; neither are unitary groups. On particular issues, their interests may diverge. Elsewhere I have discussed that, rather than a pyramid, this litigation is better conceptualized as a Calder mobile. *See* Judith Resnik, *History, Jurisdiction, and the Federal Courts, Selected Memories and Limited Imagination*, The Edward Donley Lecture, __ W. VA. L. REV. (forthcoming 1995); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 502 n.30 (1986); *see also* Carrie J. Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1161 (1995).

Coffee's claim that "defendants have little reason to encourage the use of class actions" in contexts when individual stakes are low is also questionable. Coffee, Collusion Draft, *supra* note 1, at 5. I wonder both about the empirical bases of this assumption and also about whether variation might exist among defendants or based on the kind of case involved. *Cf.* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991) (discussing incentives of securities litigants). It is at least plausible that defendants might want to settle and avoid future litigation in contexts other than torts. *Cf.* Coffee, Collusion Draft, *supra* note 1, at 39.

Coffee outlines the interests of the judiciary, whom he describes as awed by the volume of individual yet similar tort claims and therefore in quest of modes of speedy disposition. He argues that judicial agendas augment the power of the defendants, whom he describes as "fast learners"[11] and who offer judges some comfort via global settlements—a deal that presumably lays to rest, in one fell swoop, whatever problems are at hand.[12]

The sources of the power of "players"—judges and plaintiffs' lawyers—are key to Coffee's story. Judicial power stems not only from the class action rule but also from the federal statute conferring power on the Panel for Multidistrict Litigation ("MDL") to consolidate cases from different federal districts.[13] The panel has emerged as a potent force; its ability to consolidate federal cases includes the power to halt proceedings in pending cases by ordering that they be transferred to a judge assigned to handle the multidistrict litigation. Coffee argues that, functionally, MDL transfers often translate into stays that decrease the value of cases by the delay produced.[14]

The class action rule gives judges the official power to recognize "representative" plaintiffs, and therefore to decide which lawyers will appear on behalf of the class. While the MDL statute does not have the same structure, the de facto judicial power is parallel: judges can determine who the central *lawyers* for the plaintiffs will be. Judges appoint or anoint particular lawyers and give them the authority of representation.

Coffee's discussion then turns to the lawyers who are members of the plaintiffs' bar. He sketches how plaintiffs' attorneys compete for control over litigation; he argues that defendants can generate a "reverse auction," in which defendants offer plaintiffs' lawyers agreements that are beneficial to defendants, and courts sanction the activity by approving the negotiations that occur on behalf of a group of plaintiffs.[15] For Coffee, the emergence of the "settlement class" is a specific vehicle of unfairness, because the franchise of representation (a "less than complete property right"[16]) granted to the plaintiffs' attorneys exists for settlement purposes only. The threat of trial is gone when a settlement class is certified.

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11 I am paraphrasing here. *See* Coffee, Collusion Draft, *supra* note 1, at 32 ("Defendants learn fast."); at 38 ("[t]he diffusion of legal knowledge is rapid within the interconnected defense bar."); *see also* Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 954-55, 962.

12 Coffee, Collusion Draft, *supra* note 1, at 5.

13 28 U.S.C. § 1407 (1988).

14 Coffee, Collusion Draft, *supra* note 1, at 35.

15 *Id.* at 9; Coffee, Summary, *supra* note 1, at 853.

16 Coffee, Collusion Draft, *supra* note 1, at 15.

According to Coffee, for plaintiffs' attorneys to negotiate aggressively, they must have the power to threaten to break off negotiations—to slam down the phone and say, "I'll see you in court." Once everyone knows that no plaintiffs' lawyers can make such a claim, the game is up: defendants hold all the cards. In short, by the creation and approval of settlement class actions, defendants and courts disable plaintiffs' attorneys collectively by empowering a subset of plaintiffs' lawyers whose goals are to negotiate settlements with defendants. Shut out are those plaintiffs' lawyers who are willing to litigate and to try cases.

II

ENLARGING THE FRAME OF REFERENCE: AGGREGATION AND SETTLEMENT BEYOND RULE 23

I share Coffee's and Marcus's interest in learning from the cases that go under the nomenclature "mass tort class actions." But to derive their import, I rely on sources in addition to those offered by either author. Jack Coffee argues that procedure teachers are now "historians of civil litigation"[17]—out of sync with contemporary reality. Let me embrace rather than duck that accusation and show briefly the utility of a focus larger than the current decade and a single set of cases.[18]

A. The Quest for Aggregate Processing: From the 1960s to the 1990s

I am less surprised than Coffee and Marcus about current events, and my lack of surprise comes from a different take on from whence we come. A fuller contemplation of a bit of relatively recent civil procedure history explains why.

As Marcus and Coffee both note,[19] in the early 1960s, when the Advisory Committee drafters were framing their rule on class actions, their focus was not on mass torts (in those days often called "mass accidents"), but rather on other cases: securities or antitrust claims, civil rights desegregation suits, and certain kinds of property disputes,

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17 *Id.* at 17.

18 My comments here relate to my work on the interrelationships between class actions and other forms of aggregation. *See* Resnik, *From "Cases" to "Litigation"*, *supra* note 7; Resnik, Curtis & Hensler, *Individuals Within the Aggregate*, *supra* note 9.

Peter Schuck's commentary on the "common law evolution" of mass tort litigation also looks at these issues over a period of time. Schuck, *supra* note 11, at 947-48. As I broaden the discussion, I want also to echo Roger Cramton's concern that, even within a focus limited to mass tort class actions, we may fail to distinguish kinds of cases and settlement agreements that merit differing appraisals of their overall legitimacy, fairness, and ethics of a decision in a specific case. Cramton Memorandum of Sept. 19, 1994, *supra* note 3.

19 Marcus, *supra* note 1, at 872; Coffee, Collusion Draft, *supra* note 1, at 53.

such as those involving competing claims to an insurance or other fund. The drafters were not oblivious to the relationship between mass accidents and class actions. Rather they decided, affirmatively, to "keep [mass accidents] out."[20]

Why close that door? As I read the archival memoranda among the committee members who, between 1963 and 1964, formulated the language that became the 1966 class action rule, they had several objections to inclusion of mass torts within the class action framework.[21] One concern was about individual autonomy, a theme that echoes through the papers for this conference.[22] As Kaplan explained in a memorandum in January of 1963, an individual tort plaintiff had an interest in "pursuing his own litigation in his own way in a forum of his own selection."[23] Whereas in other areas of law, individual control seemed less pressing, in the context of tort litigation, individual authority and control appeared particularly important. Tort law had conceptualized injuries done to an individual's body as specific and personal. Further, under the *Erie* doctrine, federal law required the application of state substantive norms. Thus, a related but distinct point was an assumption that, even if one were to group mass accident

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20 Letter from Benjamin Kaplan, Reporter for the Advisory Committee, to John P. Frank 2 (Feb. 7, 1963), *microfiched on* CIS No. CI-6312-32 (Congressional Info. Serv.) [hereinafter Kaplan Letter of Feb. 7, 1963]. This research and its limits are detailed in Resnik, *From "Cases" to "Litigation"*, *supra* note 7, at 9-14 & n.17. The archival material is now collected, on microfiche, by the Congressional Information Service, see CIS Records of the U.S. Judicial Conference, Committees on Rules of Practice and Procedure 1935-1988, No. CI-6312-32 (1991 Congressional Info. Serv.) for the Feb. 7th letter, referred to above [hereinafter CIS Judicial Conference Records].

21 Resnik, *From "Cases" to "Litigation"*, *supra* note 7, at 9-14. For this discussion, I rely on correspondence between Benjamin Kaplan (the Harvard law professor who was then the reporter and is now a justice in Massachusetts) and other committee members, on the committee's memoranda, and on published essays by Professor Kaplan about Rule 23.

22 *See, e.g.*, Coffee, Collusion Draft, *supra* note 1, at 53 (stating that the drafters of Rule 23 believed that "'mass accident' cases were ordinarily not appropriate for class action treatment because of the likely presence of significant questions (such as individual causality) that would affect the individual in the class in different ways"); Marcus, *supra* note 1, at 889-90 (noting a "nagging sense that the uniquely personal nature of the claims compromised [in mass tort class actions] should matter;" that opt-out provisions in these cases "properly signal[ ] a serious concern with ensuring that [claimants] understand what they are giving up in settlements like the ones recently approved," and that "courts should be singularly sensitive to the adequacy of notice in mass tort class actions"); Schuck, *supra* note 11, at 964 (citing "individual interests" and "claimant autonomy" as reasons for praising generous opt-out provisions in mass tort settlement); Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Prods., Inc., 80 CORNELL L. REV. 1045, 1138-47 (1995).

23 CIS Judicial Conference Records, *supra* note 20, No. CI-6313-58 (Topic EE: Modification of Rule 23 of Class Actions (Summary Statement), enclosed in Memorandum by Benjamin Kaplan to the Advisory Committee, at EE-3); Resnik, *From "Cases" to "Litigation"*, *supra* note 7.

cases together, they would "degenerate in practice into multiple lawsuits separately tried."[24]

Yet another theme that emerged was the absence of a need for class treatment. As Kaplan explained: "it would strain interpretation to say that particular actions by injured parties in a mass tort will [quoting a part of the proposed criteria for class actions] 'impair or impede the ability of the other members to protect their interests;' th[is] clause is redolent of claims against a fund."[25] In other words, in the 1960s, the drafters did not envision mass accidents as likely to prompt similarly situated plaintiffs into a competition against each other for a limited quantum of defendants' assets.

Implicit in other of Kaplan's discussions of Rule 23 is another form of the "no need" argument, one based on the view that mass tort plaintiffs have no need for class actions because they were not the kind of litigants whom Kaplan and the Committee were trying to empower. When Kaplan discussed then new Rule 23, he explained it was intended to *enable* litigation;[26] tort plaintiffs did not need that extra boost because they already had access to legal services by way of contingency fee arrangements.

Thirty years ago, experienced litigators, academics, and judges assumed that tort litigation (even that involving hundreds of people in the same accident) consisted of cases that were specific and discrete and in which defendants' relevant resources were not limited. Further, these lawyers and judges assumed that the financing mechanism of the contingent fee created sufficient economic incentives for the

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24 CIS Judicial Conference Records, *supra* note 20, No. CI-6313-87 (Topic EE: Modification of Rule 23 of Class Actions (Summary Statement) enclosed in Memorandum by Benjamin Kaplan to the Advisory Committee, at EE-27); Resnik, *From "Cases" to "Litigation"*, *supra* note 7. Kaplan raised concerns about individual liability and damages, perhaps implicitly alluding to assumptions predicated on Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). *See* Marcus, *supra* note 1, at 873-74 (discussing the different rules of law that would have to be applied).

25 Kaplan Letter of Feb. 7, 1963, *supra* note 20, at 2 (quoting a part of the proposed criteria for class actions).

26 Benjamin Kaplan, *A Prefatory Note, The Class Action—A Symposium*, 10 B.C. INDUS. & COMM. L. REV. 497, 497 (1969) (Class actions would "provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."). Marvin Frankel quoted Kaplan as saying that the class action's "historic mission [was] taking care of the smaller guy." Marvin E. Frankel, *Amended Rule 23 from a Judge's Point of View*, 32 A.B.A. ANTITRUST L.J. 295, 299 (1966). Consequently, according to Kaplan, "where the stake of each member bulks large and his will and ability to take care of himself are strong," class treatment was not necessary. Benjamin Kaplan, *Continuing Work of The Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 391 (1967).

plaintiffs' tort bar to litigate such cases, and that procedural rules were not needed to enhance claimant access.[27]

So what? Why should Coffee and Marcus care about this history? Coffee and Marcus both argue that the world of litigation is changing rapidly; they might use evidence from the Advisory Committee in part to make their point—that only thirty years ago very astute observers of the procedural landscape saw a world of individual litigants while today we see their commonality. More importantly, Coffee and Marcus should use this history for two other purposes. First, it provides a cautionary note: we too need to be humble about knowing where we are in the story, let alone what we should predict. Second, this history forms a challenge; to capture not only what is happening now but also to explain what forces caused the shift in perceptions. How could the lawyers and judges who comprised the 1960s Advisory Committee have seen these cases as inappropriate for class treatment—yet we, only thirty years later, see them as a large undifferentiated whole, to be disposed of via lump sum treatment whenever possible? How did mass torts become class actions? How did the idea of limited funds take hold? How did judges fasten on global settlements as the appropriate response?

As a commentator, I do not see my role as only raising questions; let me sketch a bit of an answer.[28] A key element in this aggregation story (one missed when the lens is focused on class actions) is that since the 1960s, a good many mass torts proceeded as de facto class actions, grouped together under a variety of rules, both formal and informal, that enabled aggregating claims and parties. To identify as formative those court opinions in the 1980s and 1990s that granted or upheld class certifications of mass torts is to miss a world of practice.[29]

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27 Of course, the analysis is more complex, nuanced, and variable, and the problems of divining "framers' intent" more complex. *See* Resnik, *From "Cases" to "Litigation"*, *supra* note 7, at 15.

For discussion of subsequent events that make tort plaintiffs' access inadequate, see David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, at 907-08 (1984) (arguing that contingency fee arrangements were insufficient to counter the resources of defendants and that aggregation was needed for mass torts to empower those kinds of plaintiffs as well).

28 For further discussion of these points, see Resnik, Curtis & Hensler, *Individuals Within the Aggregate*, *supra* note 9; Resnik, *From "Cases" to "Litigation"*, *supra* note 7.

29 *Cf.* Coffee, Collusion Draft, *supra* note 1, at 53 n.70 (referring to "important milestones in this change in judicial attitude" from the 1980s). In my view, the milestones were the practice, and the opinions are the acknowledgement of that practice. As discussed *infra*, because of the important role played by multidistrict litigation ("MDL"), Coffee's assertions about the role defendants have played need to be tested not only in the context of class actions, but also in the context of MDLs. For example, as an empirical matter, does MDL aggregation occur only wben defendants sigu on? Is a particular defendants' agreement (manufacturers, as contrasted with insurance companies) central and others subsidiary? Or is Coffee's observation of defendants' interest in aggregation as key to obtaining class certification limited to class actions themselves? *See, e.g.*, *In re* Asbestos Prods. Liab.

In practice, courts began in the late 1960s and 1970s to develop a variety of means to aggregate parties and claims. The doctrine of a decade later—that mass torts may be certified under Rule 23 as class actions and certified for settlement—followed this practice. (By the way, therein may also be a general "rule" of procedural rulemaking, that rules often codify what at least some judges, lawyers, and litigants have been doing for some time.[30])

I will not here recount in detail the many means of consolidation used by lawyers and judges. Briefly, methods include rule-based techniques, such as consolidation by Rule 42 and by the appointment of a special master under Rule 53 to superintend a series of officially discrete cases, as well as informal mechanisms, such as lawyers who negotiate "block" settlements of a stable of cases or judges who issue a single pretrial order blanketing a series of cases.[31] As Coffee and Marcus correctly identify, federal judges have played a key role in class action mass torts. Federal judges have played such a role, however, not only in the last ten years but for the last half century—and not only via Rule 23 but by reliance on other procedural rules and statutes as well as on devices of their own invention.

In 1949, federal judges became increasingly concerned with what were then called "protracted" cases of which antitrust litigation was then a prime example. Whether concerned about antitrust litigation (in the 1950s) or asbestos litigation (in the 1990s), the judicial responses, decades apart, have been similar. In both eras, Chief Justices created special committees of judges to make recommendations. When, more than forty years ago, Chief Justice Vinson appointed the

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Litig., No. VI, 771 F. Supp. 415, 416-17 (J.P.M.L. 1991) (transfer supported by 30 defendants and 17,000 plaintiffs—14,000 of which were represented by 50 lawyers—and opposed by 454 defendants and 5200 plaintiffs).

30 Another example comes from the recent debate about mandatory disclosure and the Federal Rules. The 1993 amendments to Federal Rule Civil Procedure 26, requiring disclosure of information unless a district court opts out of those provisions, is an example of a federal rule that codifies a practice already in place in some district courts:

> The rule is based upon the experience of district courts that have required disclosure of some of this information through local rules, court-approved standard interrogatories, and standing orders. . . . While far more limited, the experience of the few state and federal courts that have required pre-discovery exchange of core information such as is contemplated in Rule 26(a)(1) indicates that savings in time and expense can be achieved. . . .

FED. R. CIV. P. 26, advisory committee's note (1993). *See* Lauren K. Robel, *Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990*, 59 BROOK. L. REV. 879, 903 & n.133 (1993) ("Twenty-one courts had adopted mandatory disclosure provisions at the time that the report was written.").

31 For details, see Resnik, *From "Cases" to "Litigation"*, *supra* note 7, at 25-39, and DEBORAH R. HENSLER ET AL., ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS 94-97 (ICJ, RAND 1985).

committee on "Procedure in Anti-trust and Other Protracted Cases,"[32] the committee concluded that protracted cases "might threaten the judicial process itself."[33] The proposed judicial response was to take control. Similarly, in 1990, Chief Justice Rehnquist appointed a committee on asbestos and that group, in turn, urged both congressional action to create a national forum for asbestos cases and judicial reliance on aggregate methods as interim measures.[34]

Events over the past three decades, including today's "settlement class actions," provide evidence of these increasing efforts by the judiciary to take control. In the 1950s, Judge Murrah's committee developed a "Handbook of Recommended Procedures for the Trial of Protracted Cases."[35] In the 1960s, the judiciary worried about 1800 separate federal filings, brought by the United States government claiming that electrical equipment manufacturers violated the antitrust laws.[36] Soon thereafter, the Judicial Conference went to Congress and asked for authority to consolidate cases from different federal district courts. The result in 1968 (just two years after the class action revisions were made) was the multidistrict litigation ("MDL") statute.[37]

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32 Committee to Study Procedure in Anti-Trust and Other Protracted Cases, *Procedure in Anti-Trust and Other Protracted Cases*, 13 F.R.D. 62 (1953) [hereinafter *Protracted Cases*].

33 *Id.* at 64.

34 *See* Ad Hoc Committee on Asbestos Litigation, Summary of the Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 3 (Mar. 1991) (on file with author) ("The committee firmly believes that the ultimate solution should be legislation recognizing the national proportions of the problem . . . and creating a national asbestos dispute resolution scheme that permits consolidation of all asbestos claims in a single forum—whether judicial or administrative—with jurisdiction over all defendants and appropriate assets."); *see also id.* at 4 (If Congress did not do so, "the federal judiciary must itself act . . . ."); *id.* at 36 (urging legislation to permit "collective trials of asbestos cases"). *But see id.* at 41-43 (Separate Dissenting Statement of Judge Thomas F. Hogan) (acknowledging "national crisis involving asbestos litigation," but arguing against collective trials as "radical," "novel," and "constitutionally suspect;" and arguing in favor of the Black Lung model).

35 Alfred Murrah, *Foreword* to *Proceedings of the Seminar on Protracted Cases*, 21 F.R.D. 395 (1957); Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 351 (1960). *See* Resolutions Adopted at the Seminar on Protracted Cases, 23 F.R.D. 614, 615-16 (1958) ("The judge assigned should at the earliest moment take *actual control* of the case and rigorously exercise such control throughout the proceedings in such case.").

36 In fiscal year 1962, when those 1800 cases were filed, the federal civil docket had a total of 61,836 civil filings. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 196, tbl. C2 (1962). Thus, these cases were just under three percent of federal civil filings. Chief Justice Warren appointed Judge Alfred P. Murrah as the Chair of the Coordinating Committee for Multiple Litigation of the United States District Courts. Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621, 623 (1964). Nine federal judges supervised discovery, nationwide, in an effort to generate uniform pretrial orders. *Id.*

37 In 1964, the Judicial Conference requested statutory authority to consolidate and transfer cases; in 1968 Congress responded with the MDL statute, which provided for aggregation of lawsuits within the federal courts. *See In re* Plumbing Fixture Cases, 298 F.

While technically these cases are only consolidated for pretrial practices, functionally MDL is the end point of many cases.[38] Since the beginning of MDL, it has been used as a means of dealing with and disposing of large accidents and, more recently, of some product liability cases. Given current information,[39] it appears that in the first six years of the MDL, about a quarter of the MDL litigations certified

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Supp. 484, 498-502 (J.P.M.L. 1968) (excerpts of Report of the Coordinating Committee on Multiple Litigation recommending new § 1407 to Title 28); Note, *Consolidation of Pretrial Proceedings Under Proposed Section 1407 of the Judicial Code: Unanswered Questions of Transfer and Review*, 33 U. CHI. L. REV. 558, 559-65 (1966) (reviewing the Judicial Conference proposal); H.R. REP. NO. 1130, 90th Cong., 2d Sess. 1-10 (Feb. 28, 1968) (reviewing congressional proposal).

38 28 U.S.C. § 1407(a) (1988) ("Civil actions involving one or more common questions of fact . . . may be transferred to any district for coordinated or consolidated pretrial proceedings."). As of the late 1980s, less than one fifth of the cases brought within the MDL rubric were sent back to the originating court; most were disposed of by the MDL. Patricia D. Howard, *A Guide to Multidistrict Litigation*, 124 F.R.D. 479, 480 (1989) (2600 out of 16,700 total actions remanded; "great success of the transferee judges in terminating by settlement, summary judgment, or other type of dismissal" cases assigned to them). As of 1977, according to Judge Weigel, that remand rate was five percent. *See* Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 583 (1978).

The remand data should be used with caution. In the form available to me, I do not know the rate of remand per year or much about which cases are remanded and why. Furthermore, a resolution of large block of cases, such as the more than 25,000 asbestos cases, can affect such cumulative data. Another factor is the rate at which litigants consent to trial by the MDL judge, about which I also lack data.

39 As of 1994, more than 1043 petitions have come before the Judicial Panel on Multidistrict Litigation. MULTIDISTRICT AUTOMATED TRACKING SYSTEM: CITATIONS SUMMARY 45 (provided Oct. 19, 1994) (on file with author) [hereinafter MDL CITATIONS LIST]. Through September 30, 1994, 63,321 cases cumulatively have been transferred under that rubric. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION: CUMULATIVE FROM SEPTEMBER 1968 THROUGH SEPTEMBER 30, 1994 (1994) (on file with author) [hereinafter MDL STATISTICAL ANALYSIS].

Of the 222,509 pending cases in the federal district courts as of September, 1993, the 37,002 cases subjected to MDL treatment represented 16.6% of the federal docket. ADMINISTRATIVE OFF. OF THE UNITED STATES COURTS, UNITED STATES COURTS: SELECTED REPORTS AI-87 tbl. C-6, 55 tbl. S-10 (1993) (on file with author) [hereinafter AO SELECTED REPORTS].

Here, both thanks and a caveat are in order. The Office of the Clerk of the MDL Panel and the Administrative Office of the United States Courts keep data on MDL. My thanks to Patricia Howard, Clerk of the Judicial Panel, and Robert A. Cahn, Executive Attorney of the Judicial Panel, for assistance in obtaining the data relied upon in this Comment. While some information on the kinds of cases in which MDL is proposed is available, one cannot learn much about the interaction between MDL and class actions. For example, data identify MDL cases in which class action allegations are made, but not those in which judges certify class actions. Further, the information provided in the text is based on interpreting data listing the numbers and kinds of cases, which we (my research assistants and I) have characterized as mass torts or other kinds of actions and then counted by hand. Other interpretations of these data may well be available. To illustrate—the Citations List labels "type of action" by a two- or three-letter designation plus a shortened title (e.g., "Ford Bronco II"). We added the numbers of "AD" (air disaster), "CD" (common disaster), and "PL" (products liability) cases. Thus, all numbers and percentages are derived by us and not the MDL Panel. Another source of information is an ongoing study by Federal Judicial Center researchers. *See* Thomas E. Willging, Laurel L. Hooper, and Rob-

were mass torts.[40] In the following ten years, about a third of the cases certified were mass torts.[41] Thus, we know that mass torts (both products and accidents) are common in MDLs,[42] and that like Rule 23, MDL functions to aggregate cases and parties,[43] which in turn helps to propel judges toward global settlements. One can also see the interaction of class action and MDL status; in four of the last five years, half of the cases certified as MDLs included class action allegations.[44]

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ert J. Niemic, Preliminary Report on Time Study Class Action Cases (Feb. 9, 1995). That study is not addressed to MDL but to class actions.

40 From 1968, when it came into being, until 1975, the MDL panel transferred 168 litigations for consolidated pretrial treatment, including (by our count) 42 mass accident litigations (mostly air crashes) and three products liability cases (Dalkon, Celotex "technifoam" (house insulation) and a design defect/personal injury products liability litigation based on a faulty light plane engine). Thus, about a quarter were torts. Of those 46 litigations, two included cases requesting class action certification.

Of nontort MDLs in the same period, almost 61% (75 out of 123) included class allegations. Of MDL antitrust and securities cases, about three quarters (74%— 37 out of 50 antitrust and 28 of 38 securities cases) included class allegations. All of the five employment MDL actions included class allegations. MDL CITATIONS LIST, *supra* note 39, at 1-9.

41 From 1975 until 1985, the MDL Panel transferred 236 MDL litigations, including 64 mass accidents (air crashes, falling buildings, fires), and six products liability cases. In other words, a total of 70 litigations, or almost one-third of the MDL docket (almost 30%), were torts during that 10-year period. Additionally, within that time period, four of the 64 accidents (a bit more than 6%) and three of the six products cases also included class action allegations. That is, seven of 70, or 10%, included class action allegations. *Id.*

Turning to non-tort MDLs from 1975-1985, 80 of 166 nontort MDLs (about 48%) included class action allegations, including 26 out of 47 antitrust suits (just over 55%), 44 out of 69 MDL securities suits (almost 64%) and three out of five employment suits included class actions.

Over the last nine years, from 1986 until October 1994, when considering tort MDLs as compared to other MDLs in this period, class allegations climb in the tort cases and decline a bit in nontort cases—possibly reflecting the increased use of class actions in torts. Specifically, the MDL Panel transferred 230 litigations, of which 42 (or a bit more than 18%) were torts. Of those 42 cases, 25 were accidents and 17 were products cases. Within those 42, 13 (about 31%) included class action allegations. Among those 42 tort litigations, 8% (two of 25) of the accident litigations included class action allegations, whereas 70% (12 of 17) of the products cases included such allegations. *Id.*

For the same period, 73 out of 188 (about 39%) of nontort MDLs included class allegations, including nine out of 23 antitrust suits (just over 39%), 39 out of 71 securities actions (almost 55%) and four out of six employment cases.

42 *See, e.g.*, AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS 59 n.27 (1994) [hereinafter ALI COMPLEX LITIGATION] (listing MDLs and mass torts); *see also* Howard, *supra* note 38, at 480 (giving as examples of MDLs 1600 swine flu cases, 1100 Dalkon Shield cases, and 1100 Bendectin cases).

43 *See e.g.*, MICHAEL GREEN, BENDECTIN AND BIRTH DEFECTS: THE CHALLENGE OF MASS TOXIC SUBSTANCES LITIGATION Ch. 15 (forthcoming 1995) (concluding that in the MDL there was a "de facto 23(b)(3) class action") (manuscript on file with author).

44 MDL CITATIONS LIST, *supra* note 39, at 36-45. Specifically, as of October 1994, 25 MDLs have been transferred, of which nine include class allegations. In 1993, 14 of 24 MDLs transferred included class allegations; in 1991, 15 of 25 included class allegations, and in 1990, 13 of 27 included class allegations. The "outlier" year was that of 1992, in which seven of the 31 MDLs transferred included class allegations. In each of these years except 1994, two to three of the cases that were transferred and that included class allegations were product liability cases. As of this writing, four products liability cases are in-

One interpretation of these data is that, before class actions were as frequent in torts as they are today, MDL created a place for consolidation and aggregate treatment. While multidistrict litigation is and was an occasional event, it was a means by which judges and lawyers gained familiarity with working with tort victims in groups. In the 1980s, judges and lawyers had a second forum in which to learn about group processing of tort victims—the bankruptcy court. Key events in the history of aggregate tort litigation are the bankruptcies of Johns-Manville, manufacturer of asbestos,[45] and of A.H. Robins, manufacturer of the Dalkon Shield.[46]

Given the different techniques for aggregation, one question is whether multiple means of aggregating tort victims will continue to be used or whether a particular form (MDL, or class certification, or bankruptcy) will predominate. For example, one could read the MDL data to suggest that, since class action certification, and perhaps, the use of bankruptcy, have become more popular, the need for MDL treatment of mass torts may be declining.[47] Obviously, other factors affect the rate at which MDL status is sought and granted; a definitive analysis needs to encompass a review of those other variables, such as the decline in the 1980s of airline crashes, which have been a staple of the MDL Panel.[48] The answers to such questions (about whether, in practice, lawyers see differences or can use the two forms to strategic advantage) await further developments.

In theory, all of these different procedures are distinct. Take MDLs and class actions for example. MDLs were designed "only" to consolidate *already* pending cases, and "only" for the pretrial process. The MDL statute was billed as an effective mechanism for responding to cases already on the judicial plate. In contrast, as the class action drafters have instructed us, the class mechanism sought to *enable* the bringing of claims not already filed. But before one thinks of MDLs as only a managerial move, remember that MDLs function as temporary

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cluded and four (including Norplant contraceptives and a "carpet industry" products case) are awaiting disposition by the panel. *Id.* at 45.

45 *In re* Joint S. & E. Dist. Asbestos Litig. (Keene), 14 F.3d 726 (2d Cir. 1993); *In re* Joint E. & S. Dist. Asbestos Litig. (Findley), 982 F.2d 721 (2d Cir. 1992) *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993); Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988); *In re* Joint E. & S. Dist. Asbestos Litig. (Findley), 878 F. Supp. 473 (E.D.N.Y. & S.D.N.Y. 1995).

46 RICHARD B. SOBOL, BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY 42-48 (1991).

47 Class action mass torts may "moot" the need for MDL practice unless lawyers are able to file enough class actions in different districts so as to continue to prompt requests for the MDL rubric—or unless other incentives are at work.

48 Thanks to Robert A. Cahn, Executive Attorney of the MDL Panel, for his helpful input in interpreting MDL data. Memorandum from Robert A. Cahn to Judith Resnik (Nov. 4, 1994) (on file with author).

de facto mandatory class actions.[49] Once a litigant's case becomes a part of an MDL, that litigant cannot "opt out" during the pretrial phase. Further, under the MDL rubric, trial judges may also appoint lead counsel and plaintiff steering committees, transforming these attorneys into lawyers for a group, albeit lawyers with an even less defined set of ethical obligations than the class action lawyer.[50]

What has become plain over the past two decades is that the two aspects of aggregation, expediting and enabling, are not distinct but interact. The impulse toward expeditious and economical handling of pending cases not only prompts interest in the termination of pending cases but also in cases coming down the pike. The futures tort class action is an unsurprising evolution, emerging from practices under both the class action rule and MDL, that have pushed leaders of the bench and bar to seek ever more effective means of aggregate processing.

The ALI Complex Litigation Project also responds to the lessons learned from these past decades of practice.[51] I demur from Richard Marcus's description of the ALI Project as a "consolidation" mechanism:[52] the ALI proposal includes a procedure termed a "notice of intervention and preclusion,"—translated as requiring potential litigants to join pending proceedings or risk preclusion from relitigating the issues decided.[53] Therefore, the ALI proposal moves beyond the

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49 For a discussion of why MDLs were not accompanied by controversy similar to that of class action Rule 23, see Resnik, *From "Cases" to "Litigation"*, *supra* note 7, at 46-48.

50 For the problems of class action lawyers, see Lawrence M. Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 SYRACUSE L. REV. 709 (1989); Nancy Morawetz, *Bargaining, Class Representation, and Fairness*, 54 OHIO ST. L. REV. 1 (1993); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982).

In the MDL context, it is unclear whether lead counsel or plaintiff steering committee lawyers have obligations to other plaintiffs' lawyers or to their clients. Courts have commented about obligations of such lawyers to all plaintiffs, rather than to only those clients who retained them. *See, e.g.*, *In re* San Juan Dupont Plaza Hotel Fire Litig., 888 F.2d 940, 942 (1st Cir. 1989) (quoting district court language about lead counsel's representation of "all plaintiffs"); *In re* Agent Orange Prods. Liab. Litig., 818 F.2d 216, 223 (2d Cir. 1987) ("fiduciary duty" of lead counsel not to "overreach" in class fee application (quoting Lewis v. Teleprompter Corp., 88 F.R.D. 11, 18 (S.D.N.Y. 1980))); *In re* Aircrash Disaster at Malaga, Spain, 769 F. Supp. 90, 91 (E.D.N.Y. 1991) (citing "duties to plaintiffs" owed by lead counsel). However, little case law addresses or expressly explains what duties that representative capacity imposes. *See, e.g.*, New Jersey Dep't of Envtl. Protection v. Gloucester Envt'l Mgmt. Serv., 138 F.R.D. 421, 430 (D.N.J. 1991) ("Although the relationship between Liaison Counsel and group members is not an attorney-client relationship, the conduct of attorneys may nonetheless be guided by analogy to the Rules of Professional Conduct with respect to fees and billing arrangements.") (footnote omitted).

51 The American Law Institute's Project on Complex Litigation (for which Arthur Miller and Mary Kay Kane were the reporters) won final approval in May, 1993. ALI COMPLEX LITIGATION, *supra* note 42.

52 The ALI also described its work as "consolidation." *Id.*

53 A court may issue a "[n]otice of intervention and preclusion to individuals who are not yet parties to a consolidated action but whose joinder is deemed an integral part of making a comprehensive adjudication of a complex litigation." *Id.* at 276-77. In other

model of consolidation and starts to resemble class actions—enabling the filing of new lawsuits. The ALI's Complex Litigation proposal creates a quasi-mandatory class action, in which non-parties may be penalized for staying on the sidelines and from which parties cannot opt out.[54] The difference between the ALI 1990s proposal and the 1966 class action proposal is that what the ALI terms efficiency appears paramount in its conception,[55] whereas for at least some of the kinds of class actions created by the 1966 amendments to Rule 23, enabling access was the prime concern.

One issue is how far efficiency concerns take the ALI; it is not clear whether the ALI proposal contemplates and/or approves of the preclusion of "future" claims.[56] Whether or not the ALI has implicitly

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words, a court may decide that the pending cases do not capture all the relevant participants, and request that individuals or groups file *new* lawsuits, referred to in the ALI report as "unasserted claims." *Id.* at 277.

54 While the ALI provides some details on the form of notice and requires that nonparties be informed of the nature of the claims, the right to intervene, and the penalties and benefits that might attach, the ALI does not explain how to identify whom to notice. It recommends that the court "should enlist the aid of the existing parties in locating potential claimants." *Id.* at 300. The transferee court could, but need not, hold a hearing on the issue. *Id.* at 302 n.32.

Should a potential intervenor not put him or herself forward, the penalty (intended according to the comments to be "coercive rather than compulsory") is preclusion. *Id.* at 278 ("The nonparty effectively waives the opportunity to litigate the issues decided in the consolidated action."). While the proposal keys preclusion to actual receipt of notice, it also discusses "generalized notice" as well as an "individual notice"—making somewhat unclear whether actual receipt is a touchstone of preclusion. *Id.* at 284.

55 To decide whether to invite such intervention, courts should consider the similarity of actions and efficiency; consistency and litigant repose; and avoidance of undue prejudice, burden, or inconvenience. ALI COMPLEX LITIGATION, *supra* note 42, at 289-90 n.22 (discussing cites for the proposition that parties have no absolute right to control their own lawsuits). The ALI's focus on the courts' need to mop up all problems attempts to meld the docket-clearing imperative with individual plaintiffs' rights.

56 Arguments are available from the report that "future" claimants could be covered. For example, binding "futures" is consistent with the stated purposes of ALI's notice to intervene: to have issues concluded "once and for all," to avoid "duplicative and possibly inconsistent determinations," and to "promote a truly final decision of the underlying controversy." *Id.* at 278-79; *see also id.* at 284 (The purpose is to achieve a "final and binding result.").

On the other hand, the ALI describes the intervention procedure as inapplicable to claims of "nonparties who are unknown . . . or of claims that have not yet arisen." *Id.* at 279. But the questions are when has a claim arisen, and whether future plaintiffs are "unknown." Further, who fits the description of a nonintervening party who "knew or should have known" of the pending lawsuit? *Id.* at 285.

The report's discussion of notice supports an interpretation that it does not sanction "futures." The ALI urges courts to send such notice to "known" individuals. However, the ALI also recognizes the need to provide some forms of generalized notice. Perhaps such "group notice" could encompass some claimants who do not know of their own injuries. *Id.* at 299 (when the number of individuals to be noticed is great, some form of general or "group notice rather than using an individual mailing" may be available). The ALI also refers to "some of the innovative techniques used in class actions for identifying absent claimants." *Id.* at 300 (citing HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS 2d § 8.44 (1985)). Newberg proposed a series of methods for "absent class mem-

endorsed future class actions and settlement classes, the recommendations of the ALI, combined with the MDL statute, the use of bankruptcy, and the class action rules all support a general description of current law: while (in the words of the ALI) individual control over litigation is both relevant and "weighty," particularly in the mass tort context,[57] individual interests are not "immutable."[58] That the ALI project is styled as "merely an aggregation of individual suits,"[59] (a la MDL) bespeaks ongoing rhetorical commitment to individual processing. That the ALI proposes a power of consolidation that includes the ability to invite intervention, all in the search for finality and binding conclusive results, makes such consolidated actions look a lot like their cousins, class actions.[60]

It is this history that explains what Marcus calls the transformation of the class action from "dinosaur" to "phoenix,"[61] but the history makes the metaphor less viable. No sudden transformation has occurred. Over the past thirty years, an understanding of the utility of aggregate litigation has emerged that explains the 1966 class action's appeal in the 1990s. Today's interest in class actions stems in part from a vision of them as efficient, particularly in arenas like mass torts, in which judges are confident that, while using a class may enable new filings that would not otherwise have been brought,[62] class actions

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bers;" many of the methods assume one could, with energy and resources, locate these individuals (such as by hiring "professional locator services"). According to Newberg, "[w]hen neither names nor addresses of potential members are known, then publicity through mass media television and radio spots, . . . will have positive effects." 2 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS 3d § 8.44 (1994). That discussion may prompt a view that only those with current injuries are covered by the ALI proposal.

57 ALI COMPLEX LITIGATION, *supra* note 42, at 46 (citing Roger Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779 (1985)).

58 ALI COMPLEX LITIGATION, *supra* note 42, at 46.

59 *Id.* at 287 (citing Hansberry v. Lee, 311 U.S. 32 (1940)). The ALI project seeks to distinguish itself from class actions in that, unlike preclusion in classes in which the central question is the adequacy of representation, the ALI project appears to rest its preclusion upon the court's role to "invite participation" by giving notice. The ALI project does not discuss, however, the preclusive consequences of nonparticipation when a generalized notice is given.

Other questions emerge, including how such participation functions in practice. The ALI Project seems to anticipate that its complex litigation will be in the hands of a lawyers' executive committee or management committee. *Id.* at 294 (§ 3.01, comment d). Thus, a set of counsel would play the central role, with individual attorneys playing minor roles. *Id.* at 50-51 n.18 (discussing cooperation among lawyers).

60 The reporter comment does note the "family similarity between class actions and consolidated actions," distinguishing them by the fact that plaintiffs' lawyers create the scope of class actions, whereas under the ALI version, the courts would create the enlarged scope of consolidated actions. *Id.* at 287 n.11.

61 Marcus, *supra* note 1, at 907.

62 I do not want to iguore the "enabling" aspect of courts' work. For example, at the time of the Dalkon Shield bankruptcy filing, some 15,000 tort lawsuits had been filed against A. H. Robins. Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 983 (1993). By virtue of a

also serve as a means of processing the expected high quantity of claims that will be brought individually.

If one looks at the class action rule as *the* lens through which procedural and substantive developments have occurred, one misses the developments that have occurred through and because of other means of aggregation. Indeed, it is the historical backdrop of interest in and acculturation to aggregation that is key to the class action's use in the cases about which Coffee and Marcus write and in the expansion of class actions towards "futures." Moreover, it is not only the federal civil litigation docket that shapes the permissibility of aggregate processing. Changes in two other arenas of decisionmaking over the past three decades demonstrate the eclipse of individualized adjudicative processes in areas of law that, like tort litigation, relate to individuals in physical material terms.

Take first the sentencing guidelines. Prior to the adoption of guidelines, the law expressed a commitment to individual sentencing that was based on the particulars of each case, with a specific defendant who had committed a particular offense and who stood before a given judge. No more. Today's federal sentencing is decided by reliance on a grid, on which offense and defendant are both coded. Assessing variables about the kind of offense and prior history, a judge is told to impose a sentence within a given range, such as fifty-seven to seventy-one months.[63] Or Congress mandates ten years.[64]

Another example is the social disability system. As of 1992, 860 administrative law judges listened to individual complaints of disability; some 250,000 cases are filed annually.[65] Those judges too rely on

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mass notice procedure relying on media advertising in that bankruptcy proceeding, about 300,000 additional claims were filed. Herbert M. Kritzer, *Public Notification Campaigns in Mass Litigation: The Dalkon Shield Case*, 13 JUSTICE SYSTEM J. 220, 223 (1988-89) (of these, some 193,000 filings were deemed valid); *See also* MARK PETERSON & MOLLY SELVIN, RESOLUTION OF MASS TORTS: TOWARD A FRAMEWORK FOR EVALUATION OF AGGREGATIVE PROCEDURES 29 (ICJ, RAND, 1988) (over 200,000 valid filings). The other side of enabling, however, is overclaiming, the filing of nonmeritorious claims made easily available by ready access. Holding aside that problem, the comparison reveals that the tort system did not provide an avenue for a host of women who claimed they had been injured.

63 UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL 270 (West 1994).

64 *See, e.g.*, 21 U.S.C. § 841(b)(1)(A) (1988), which imposes sucb a sentence on anyone intentionally or knowingly manufacturing, distributing, dispensing, or possessing specified quantities of listed "controlled substances:" one kilogram of heroin, five kilograms of cocaine or coca leaves, 50 grams of a cocaine base-containing substance, 100 grams of PCP, 10 grams of LSD, 400 grams of N-phenyl-N propanamide, one kilogram of marijuana, or 100 grams of methamphetamine; *see also* UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 10 (Aug. 1991) (approximately 100 federal offenses then carried mandatory minimum sentences).

65 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 1992, at 786 nn.24 & 26.

a grid to standardize both the form of complaint and the mode of judgment. Why use this example? As I read Jack Coffee's argument that "one must . . . recognize the likelihood of a reluctance on the part of trial judges to allocate scarce judicial time and resources to processing a hoard of repetitive individual cases on behalf of desperately ill individuals,"[66] I thought how aptly those words fit both the disability claimants and the frequent delegation of social security cases to magistrate judges.[67]

In short, across the federal civil docket to the criminal docket, and from there to the administrative docket, developments over the last thirty years have yielded a societal comfort with the prospect of judgments in some massed bureaucratic form, a judgment process that looks very different from the imagined moment of individual judgment paradigmatic of tort (and other) kinds of litigation.[68] Aggregate processing, from settlement class actions (that beget rules of decision that appear to violate *Erie*[69]) to disability grids, both expresses and creates legitimacy for these modes of decisionmaking.

I am not arguing that the system is seamless or that the transition has been complete. It is possible that comfort with administrative processing is related to a perception that one will not be subjected to it, that many do not imagine themselves disabled and thus within the social security regime, or subject to criminal penalties. Further, jury trials remain a frequently stated ideal. I was struck at a recent American Bar Association conference on the jury that few participants expressed negative feelings about the institution of the jury or sought its abolition.[70]

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66 Coffee, Collusion Draft, *supra* note 1, at 6.

67 *See* Judith Resnik, *Housekeeping: Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909 (1990). For a discussion of the delegation of such cases by Article III judges to magistrates, see CARROLL SERON, THE ROLES OF MAGISTRATES: NINE CASE STUDIES 83-92 (1985); CARROLL SERON, THE ROLES OF MAGISTRATES IN FEDERAL DISTRICT COURTS (1983); CHRISTOPHER E. SMITH, UNITED STATES MAGISTRATES IN THE FEDERAL COURTS: SUBORDINATE JUDGES 20, 61-62, 79-80, 87-88, 175-78 (1990); Carroll Seron, *The Professional Project of Parajudges: The Case of U.S. Magistrates*, 22 L. & SOC'Y REV. 557 (1988).

68 Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 91-92.

69 Marcus, *supra* note 1, at 872-73.

70 VERDICT: ASSESSING THE CIVIL JURY SYSTEM, (Robert E. Litan ed., 1993). Those who voiced concerns include George Priest and Peter Schuck. *See* George L. Priest, *Justifying the Civil Jury*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra*, at 103, 124, 131 (asking "what good reasons are there for convening twelve citizens to determine damages in the 52.91 percent of civil cases where the most serious injury suffered by the plaintiff was a cut, fracture, strain or bruise?" and suggesting that "the shift of routine litigation to the judicial calendar will increase predictability and promote settlement"); Peter H. Schuck, *Mapping the Debate on Jury Reform*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra*, at 306, 331 ("Some attempt to rationalize the way in which damages for nonpecuniary losses are assessed probably offers the greatest promise of meeting the legitimate concerns of the jury's critics."); *see also* Schuck, *supra* note 11, at 977 (discussing the expansion of jury availability

While the rhetoric of individualization remains vital, the practice has shifted. Courts now create mini-agencies to distribute funds across a group of people, massed together by virtue of similar (but far from identical) sets of injuries or exposures, or perhaps lining up in some future, imaginary queue.[71] These creations are deeply continuous with a half century of developments towards more administrative processing and less decisionmaking by judges involving individual adversaries.[72]

This overview helps to provide responses, not only to Coffee and Marcus, but also to Carrie Menkel-Meadow's thoughtful questions about whether we must "alter our ideals of *individual justice* to deal with a world in which technology and modernity bring mass harms that may require *aggregate justice*."[73] The answer is that these ideals have already been reshaped, not only in the context of mass disasters but also in the context of mass problems, such as decisions about the receipt of federal benefits and sentencing.

Another question is thus clarified: Given the rise of administrative adjudication and aggregate decisionmaking in a variety of contexts, what is the vitality of an ideal of individual justice as exemplified by access to an individual trial? In practice, I believe we are witnessing the alteration of *court*-based individual adjudication—as it melds with "alternative dispute resolution,"[74] relocates in part to administrative agencies, and increasingly emphasizes settlement.[75] Yet another question is whether Judge Weinstein is correct that the contemporary innovations are an attempt to "preserve the essence of our prior

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under the 1991 amendments to the Civil Rights Act and the refusal to turn the Federal Employer Liability Act of 1908 into a workers' compensation system).

71 These facilities are often a melange, part administrative agency, part court, part insurance agency. For analysis of when administrative responses are appropriate, see Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 MD. L. REV. 951 (1993).

72 WOLF HEYDEBRAND & CARROLL SERON, RATIONALIZING JUSTICE (1990); *see also* Judith Resnik, *Procedural Innovations, Sloshing Over: A Comment on Deborah Henlser, A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1627 (1995).

73 Menkel-Meadow, *supra* note 10, at 1171.

74 Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995) [hereinafter Resnik, *Many Doors*].

75 *See generally* Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994) (examining contemporary attitudes on the "utility and desirability of adjudication") [hereinafter Resnik, *Whose Judgment?*]; *see also* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1388-89 (1994) (arguing that "[w]e simply don't know about the wider effects of judicial settlement promotion").

conceptual approach to the law,"[76] or whether it is time to admit that "our prior conceptual" approach has been largely abandoned.

B. In Search of Settlement: Judges as a "Limited Fund"

Let me move then from this point about a widespread phenomenon of aggregate processing (exemplified by, but not exclusive to, mass tort class actions and the claims facilities they spawn) to my next point about the impulse towards settlement. Both Marcus and Coffee note reliance by courts on the "limited fund" concept in Rule 23 as a basis for certification of mass torts.[77] As Marcus details, interesting questions exist about exactly how limited those funds are; empirical questions include the degree to which defendants have such limited funds or are able to create the perception of limited funds and the rate at which plaintiffs assert unmeritorious claims.

But it is not only defendants and plaintiffs who think in terms of limited funds; the judges see themselves as a limited fund, a finite resource. Here, again, a reminder based on history is in order. Federal judges have reported a fear of multiple, redundant, related actions overwhelming the courts since at least 1951, when (as noted above) the committee chaired by Judge E. Barrett Prettyman warned that "protracted" cases "might threaten the judicial process itself."[78] Judicial interest thus flows not only towards aggregation but also towards settlement. Over the past forty years, the judicial role has been reformulated, creating the "managerial judge," now codified by means of Rule 16 of the Federal Rules of Civil Procedure and by the Civil Justice Reform Act of 1990.[79]

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76 WEINSTEIN, *supra* note 2, at 1 . Weinstein further argues that those ideals are not "outmoded," but at the same time are not necessarily required in all kinds of cases. *Id.* at 2.

77 Marcus *supra* note 1, at 877-880; Coffee, Summary, *supra* note 1, at 855.

78 *See Protracted Cases, supra* note 32, at 64. For another example of judicial fear of caseload increases, see *Report of the Committee on Habeas Corpus Procedure Submitted to the Judicial Conference of the United States* (June 7, 1943) (available from the Administrative Office of the United States Courts, habeas corpus microfiche subject file, fiche 1) (raising concerns about the quantity of filings by prisoners); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 907-909 (1984) (describing data on filings by prisoners and perceived effects). Stephen Yeazell's history of the class action finds that courts aggregated cases for their own convenience in medieval times. STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 75-85 (1987).

79 *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). As written in the 1930s, the Federal Rules allowed trial courts discretion to convene pretrial conferences. FED. R. CIV. P. 16, *in* FEDERAL RULES OF CIVIL PROCEDURE: ANALYZED AND ANNOTATED 40 (Harry Graham Balter ed., 1938).

After judges advocated and undertook a more active role, the rules were amended. The 1983 amendments required judges to schedule pretrial conferences; the topics to be addressed included "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute." FED. R. CIV. P. 16(c)(7) (1983). A decade later, in 1993 amendments, Rule 16 was again amended, to revise the description of these "extrajudicial procedures" (or ADR) by describing them as "special procedures to assist in resolving the dispute when

As this mention of general civil rules and statutes illustrate, the story that Coffee and Marcus sketch is not broad enough; judicial anxiety and interest in self-preservation are apparent in many places across the federal docket.[80] To the extent questions are being raised about the wisdom of judicial responses to the sense of an unending need of citizens for judgment, those questions should not be targeted only at the creation of mass tort settlement class actions.

What the mass tort class action does is to make visible some forms of settlement practice (not unique to that context) that Coffee finds noxious and some forms of lawmaking that give Marcus pause for concern. The questions (a good deal of them empirical) are whether the settlement agreements in this arena are qualitatively different from those increasingly common in other forms of litigation, whether the third party effects are substantially more egregious, and whether the judicial pressure for settlement is differently insistent.

For example, how many individual cases (tort and non-tort) are filed with the view that plaintiffs' lawyers will in fact slam down a phone and say, "I'll see you in court!"? In other words, Coffee's argument that mass torts are uniquely disabling of plaintiffs' attorneys may be empirically untrue; plaintiffs' attorneys may often have a limited mandate and limited powers, or may themselves decide that the financial rewards possible from trial (to either their clients or themselves) do not merit the risks and investment of resources. Further, judges' interest in settlement may also result in judicial insistence on the pursuit of settlement as a prerequisite to any further decisionmaking. The empirical question here is about how the various programs for alternative dispute resolution and the reemergence of proposals to permit fee shifting for failure to settle[81] affect the capacity of plaintiffs (or defendants) to insist on a trial. Turning to the third-party effects that futures class actions implicate, how many agreements on settle-

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authorized by statute or local rule." The Advisory Committee's note explains that the revision "describe[s] more accurately" procedures aside from "traditional settlement conferences" that "may be helpful in settling litigation." FED. R. CIV. P. 16(c)(9) advisory committee's note (1993). The 1993 amendments further detail the judicial role in managing the pretrial process, controlling discovery, structuring trials, and helping parties to settle cases; judges were also authorized to require parties or their representatives to be at conferences or to be available by phone "to consider possible settlement of the dispute." *See* United States Supreme Court, Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401, 427-431 (promulgated rule 16(c), effective Dec. 1, 1993) (Rule 16(c)); *see also* the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482 (Supp. V 1993).

80 Coffee argues for the "unique context" of mass torts in which courts are self-interested. Coffee, Collusion Draft, *supra* note 1, at 3. *Compare* Jonathan R. Macey, *Judicial Preferences, Public Choice and the Rules of Procedure*, 23 J. LEGAL STUD. 627 (1994); Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647 (1994).

81 *See* William W Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147 (1992).

ment include the destruction of documents[82] or the vacatur of opinions potentially available as precedent?[83]

The list can go on, but the point should be clear. Jack Coffee has found settlement-hungry judges in mass torts; Richard Marcus says he has found law-making judges in settlement. Both insights are correct, but those kinds of judges exist in other cases as well. The pursuit of settlement may be most vivid, the scale more grand, the media more able to capture it, but the phenomenon is not limited to these kinds of cases, nor do only agreements in mass torts have third-party effects.

Moreover, the interest in settlement is not framed purely from a fear of overload. The pursuit of settlement is fueled by disillusionment with trial and adversarialism as well as by increased valuation of consent as a predicate to resolution. Interest has waned in factfinding as the predicate to action and in trial as the means of achieving fact and transforming it to legal obligation. Aggregation has both heightened the visibility of these changing values and made the spectacle of trial all the more awesome. The general problem is whether to applaud or bemoan the retreat from trial and the shift to an ideology of consent and compromise.[84]

III

CONCLUSION: QUESTIONS IN CONTEXT

The use of class actions in mass torts is a part of a societal movement away from individual adjudication. Mass torts are but one of several examples of aggregate decisionmaking, calling into question the propriety of normative claims about "our system." As of 1995, "our system" is one of dispute resolution in many fora, agencies, courts, private settings, and places in between. Some of it is aggregated, some of it individualized, to varying extents. Over a half century, we have been shifting the venue of decisionmaking away from courts and away from an individual litigant model. Adjudicatory and related activities now occur in a variety of settings, with a range of procedures. Within the federal system, individual decisionmaking is often times not conducted by Article III judges or by juries, but delegated to magistrate and bankruptcy judges, to administrative law judges, and to personnel at claims facilities.

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82 *See Court Secrecy: Hearing Before the Subcomm. on Courts and Admin. Practice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. (May 17, 1990); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991).

83 *See* Resnik, *Whose Judgment?*, *supra* note 75.

84 *See* Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631; Susan S. Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridicial Subject*, 66 DENV. U. L. REV. 437 (1989); HEYDEBRAND & SERON, *supra* note 72; Resnik, *Whose Judgment?*, *supra* note 75; Resnik, *Many Doors*, *supra* note 74.

The interest in settlement of the mass torts subjected to class treatment is also linked to a general shift in focus from an emphasis on adjudicatory processes to conciliatory ones, from a focus on rights to a focus on resolution. The challenge for those who write about mass torts is to consider how and whether these cases raise distinctive problems about aggregation and settlement, or whether the criticisms leveled in this context should be directed more broadly to bemoan a host of contemporary developments.